The CISG – A Story of Worldwide Success

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I. Introduction

"The United Nations Convention on Contracts for the International Sale of Goods (CISG) […] has now gained worldwide acceptance."[1] With this statement the late Professor *Peter Schlechtriem* described the process of the unification of international sales law that began with the works of the famous Professor *Ernst Rabel* in the 1920s and has recently seen Japan become the 71st member state of the CISG.[2] It is indeed a story of worldwide success everyone has hoped for but most probably did not expect. And even though much has been said about the scepticism of commercial trade practice towards the Convention and its alleged minor role in the legal community – today this can be discarded as gossip.[3]

Approximately 2,500 – published – court decisions and arbitral awards, an abundant number of scholarly writings, numerous conferences and last but not least the Annual Willem C. Vis International Commercial Arbitration Moot show the prominent role the CISG plays in practice, legal science

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[1] P Schlechtriem, 'Introduction' sub. I, in; P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford, Oxford University Press, 2nd edn, 2005) (hereinafter cited as "Commentary").

[2] The Japanese Parliament has voted for the accession to the CISG on 19 June 2008. The Convention was ratified on 1 July 2008 and will enter into force on 1 August 2009, see http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

[3] More guardedly J Meyer, *UN-Kaufrecht in der deutschen Anwaltspraxis,* 69 RabelsZ (2005), 475, 486.

and legal education. This is without even analysing the economic power of its member states and its influence on domestic legal systems and uniform law projects. Both these points will be addressed during the course of this paper.

Even though the CISG's 25th anniversary was celebrated back in 2005, its success is still a fragile one – even despite the latest good news of Japan entering the CISG-community. While the Convention had and still has a harmonising effect on domestic contract laws, the dangers of carrying old domestic preconceptions into the CISG are still present. In other words, a uniform understanding and thus a uniform interpretation and application as required by Article 7(1) CISG has not yet been achieved and it is obvious that courts, arbitral tribunals and legal scholars will have to make further efforts to live up to the mandate of the said provision.

In this regard the CISG-community is lucky not to be starting from scratch. The extensive debate on Article 7(1) CISG in commentaries, case annotations, journal articles and all other kinds of publications shows that the problem has been identified and that we have arrived at the central issues, for example: questions concerning the authority of foreign courts judgments; the interpretative value of uniform projects like the UNIDROIT Principles on International Commercial Contracts (PICC), the Principles of European Contract Law (PECL) or the Draft Common Frame of Reference (DCFR); their interplay with the Convention; the methodology in uniform law and the discipline of comparative law as method of interpretation. The results of this debate so far have not only been an increased number of court decisions having regard to foreign courts but also the establishment of the Advisory Council on the CISG in 2001 – a private initiative of scholars from various legal systems publishing opinions on central questions of the CISG.[4]

During the course of this paper remarks will be made on the history of the Convention, its member states, its function as a role model for domestic legislators and uniform projects, its role in practice and, finally, on some misunderstandings about, and dangers to, the level of uniformity that so far has been achieved.

[4] See http://www.cisgac.com.

II. History

The historical developments of international sales law have often been reported and this is certainly not the place to give another full account. Thus only the most important milestones will be addressed.

On 3 September 1926 the International Institute for the Unification of Private Law (UNIDROIT) was founded in Rome and inaugurated on 30 May 1928. In the same year Ernst Rabel suggested pursuing the unification of international sales law. On 21 February 1929 Rabel handed in his preliminary report on the possibilities of sales law unification. On 29 April 1930 a committee consisting of representatives from different legal systems was instituted. The first draft of a uniform sales law was published in 1935. In 1936 Rabel published the first volume of his seminal work "Das Recht des Warenkaufs" providing an analysis of sales law at that time on a broad comparative basis.[5]

In 1964 the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) and the Uniform Law on the International Sale of Goods (ULIS) were drafted and finalised at the conference in The Hague.[6] However, these first uniform sales laws did not fulfil their high hopes and expectations. Although their practical relevance should not be underestimated,[7] only nine countries became member states[8] while important economies like France and the USA did not participate.[9] Furthermore, socialist and developing countries perceived these uniform laws as favouring sellers from industrialised Western economies.[10]

On 17 December 1966 the United Nations Commission on International Trade Law (UNCITRAL) was instituted. UNCITRAL continued the

[5] See on the later influence of this work H Rösler, *Siebzig Jahre Recht des Warenkaufs von Ernst Rabel Werk- und Wirkgeschichte*, 70 RabelsZ (2006), 793 *et seq*.

[6] See on this conference E vCaemmerer, *Die Haager Konferenz über die internationale Vereinheitlichung des Kaufrechts vom 2. bis 25. April 1964,* 29 RabelsZ (1965), 101–145.

[7] See the collection of decisions by P Schlechtriem and U Magnus (eds), *Internationale Rechtsprechung zu EKG und EAG, Eine Sammlung belgischer, deutscher, italienischer, israelischer und niederländischer Entscheidungen zu den Haager Einheitlichen Kaufgesetzen,* Baden-Baden; Nomos 1987.

[8] These states were Belgium, Gambia, Israel, Italy, Luxemburg, The Netherlands, San Marino, Great Britain and Germany.

[9] See P Schlechtriem, *Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods,* Vienna; Manz (1986), pp. 16, 17 (hereinafter cited as "Uniform Sales Law".

[10] See P Schlechtriem, *Uniform Sales Law,* p. 17.

work on the unification of sales law from 1968 onwards using the Hague Conventions as a basis. The first draft of a uniform law was finalised in January 1976. In 1978 UNCITRAL circulated a subsequent draft containing rules on contract formation as well as the substantive sales law amongst the governments of the UN-members.[11]

Between 10 March and 5 April 1980 delegates from 62 nations deliberated the CISG at the now famous Vienna Conference. At its end 42 countries voted in favour of the Convention. On 11 December 1986 the necessary number of ten ratifications (Art. 99 CISG) was reached and the Convention entered into force on 1 January 1988. The official languages are Arabic, Chinese, French, English, Russian and Spanish. Austria, Germany and Switzerland agreed on a German translation in 1982 but could not, however, agree on all terminologies.

III. Member States

Today the CISG has 73 member states.[12] A few figures may shed further light on this number. Nine out of the ten leading trade nations in 2006 are today member states with the United Kingdom being the sole exception.[13] Similarly, nine out of the ten major trading partners of Sweden are member states.[14] Within the ever increasing market of the European Union 23 out of the 27 members are member states of the CISG.[15]

Having regard to the development of international trade these figures become all the more impressive. In 2006 the worldwide merchandise export trade amounted to USD 11.783 billion and the import trade to 12.113 billion USD, about ten times as much as when the Convention was drafted.[16] This is not least due to the containerisation that has revolutionised cargo

[11] See P Schlechtriem, *Uniform Sales Law,* p. 18.

[12] An updated status is available at http;//www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

[13] See the statistics of the World Trade Organisation, available at; http;//www.wto.org/english/res_e/statis_e/its2007_e/its07_world_trade_dev_e.htm.

[14] See the statistics of the Swedish Statistics Bureau, avialable at http;//www.scb.se/templates/tableOrChart____142266.asp

[15] The missing countries are Ireland, Malta, Portugal and the United Kingdom. However, Portugal is expected to become a member state in the near future.

[16] See the WTO trade statistics for 2006 http://www.wto.org/english/res_e/statis_e/its2007_e/its07_world_trade_dev_e.pdf.

shipping. As of 2005 some 18 million total containers made over 200 million trips per year. There are ships that can carry 15.000 20-foot equivalent units.[17] Moreover, today it is cheaper to ship a bottle of wine from Australia to Hamburg than to bring it from Hamburg to Munich.

IV. CISG as Role Model

Today it is a well known fact that the CISG has exerted influence on an international as well as domestic level.[18] Thus, when the first set of PICC was launched in 1994 they closely followed the CISG not only in its systematic approach but also with respect to the remedy mechanism.[19] The same holds true for the PECL issued in 1999.[20] Furthermore the EC Directive on certain aspects of the sale of consumer goods should be mentioned here.[21] It took its definition of conformity of goods from Article 35 CISG and thus introduced this concept into the domestic sales laws of the EU member states.[22] In Africa the 16 member states of the Organisation for the Harmonisation of Business Law in Africa, or in French, *l'Organisation pour harmonisation en Afrique du Droit des Affaires* (OHADA) have adopted the *Acte uniforme sur le droit commercial général* (AUDCG) which is also primarily based on the CISG.[23] Finally, the Draft Common Frame of Reference published in the

[17] For example the Danish Ship "Emma Maersk" launched in 2006 with a length of 396m and a width of 63m which can carry 15,000 containers or 123,200t.

[18] See P Schlechtriem, '25 Years of the CISG: An International lingua franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts', in: HM Flechtner, RA Brand and MS Walter (eds), *Drafting Contracts Under the CISG,* Oxford, Oxford University Press (2008), 167, 174, 177 (hereinafter cited as '25 Years') and P Schlechtriem, *Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations,* 10 Juridica International (2005), 27 *et seq*. (hereinafter cited as "Basic Structures".

[19] See MJ Bonell, *The CISG, European Contract Law and the Development of a World Contract Law,* 54 American Journal of Comparitive Law (2008), 1, 16.

[20] See O Lando, *CISG and Its Followers; A Proposal to Adopt Some International Principles of Contract Law*, 53 Am. J. Comp. L. (2005), 378, 381.

[21] EC Directive 1999/44/EC.

[22] Cf. for example § 434 German Civil Code; Art. 922 Austrian Civil Code; Sec. 75A, 76 Danish Sale of Goods Act as of 6 June 2007; § 217 Estonian Law of Obligations Act; Sec. 17 Finnish Sale of Goods Act 1987; Art. 211 French Code of Consumption; Art. 7:17 Civil Code of The Netherlands.

[23] See UG Schroeter, *Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht*, Recht in Afrika 2001, 163, 166 et seq.

beginning of 2008 is not much more than a continuation of all these different unification efforts based on the CISG.[24]

Three main features can be identified that have influenced all of these instruments. First, the drafters of the CISG endeavoured to depart from domestic legal terms and concepts, instead seeking an independent legal language.[25] Indeed, to a large extent they succeeded. Likewise, traditional domestic systematic approaches have been discarded. Instead the Convention features a transparent structure unfettered by any historical whimsicalities.[26] Thus, for example, the sections on the obligations of the seller are followed by the section on remedies for breach of contract by the seller. What has proven most influential on a substantive level is, however, the remedy mechanism. The Convention, unlike the Roman heritage in Civil Law countries, does not follow the cause oriented approach but the breach of contract approach of Common Law descent.[27] Special features of these systems have been overcome making the CISG truly suitable for the international context.

Over the last two decades the CISG has also proven to be a decisive role model for domestic legislators and not just on an international level. Finland, Norway and Sweden took the coming into force of the CISG in their countries on 1 January 1989 as an opportunity to enact new domestic sale of goods acts, thereby heavily relying on the CISG albeit without Part II of the CISG (the provisions on formation of contracts).[28] With the end of the cold war and the collapse of the former Soviet Union the young Eastern European states looked to the CISG when facing the task of formulating their new civil codes.[29] This holds true on the one hand with regard to the Common-

[24] See P Schlechtriem, *Basic Structures,* above at n. 20, p. 28; C vBar, *Working Together Toward a Common Frame of Reference,* 10 Juridica International (2005), 17, 22.

[25] See F Ferrari, 'Art. 7, para. 9', in: I Schwenzer (ed), *Schlechtriem/Schwenzer – Kommentar zum Einheitlichen UN-Kaufrecht,* 5th edn, Munich: Beck (2008) (hereinafter cited as "Kommentar").

[26] See P Schlechtriem, *Internationales UN-Kaufrecht,* 4th edn, Tübingen: Mohr (2007), para. 5.

[27] See P Schlechtriem, Commentary, Introduction, sub. II.

[28] Of course the method of implementation of the CISG differed. While Finland and Sweden introduced the CISG along side their domestic sales laws, Norway enacted one single sales law for international and domestic sales contracts. See for criticism V Hagstrøm, *CISG – Implementation in Norway, an approach not advisable,* Internationales Handelsrecht 2006, 246 *et seq*. Lately, a new Danish Sale of Goods Act has been drafted, see http://www.sprog.asb.dk/sn/cisg.

[29] See P Schlechtriem, 25 Years, p. 177 et seq.

wealth of Independent States (CIS)[30] and the Baltic states amongst which Estonia is the most prominent exponent. Nowadays, China is of utmost importance for international trade. The contract law of the People's Republic of China dated 15 March 1999, again, closely follows the CISG. Finally, the modernisation of the German Law of Obligations which began in the 1980s was from the very beginning strongly influenced by the CISG.[31] Although the final outcome that entered into force on 1 January 2002 had lost much of that initial spirit, one may still identify the basic concepts of the CISG.[32]

V. CISG in Practice

It certainly is clear nowadays that the mere existence of the CISG is well known amongst lawyers engaged in international trade. However, there still seems to be a strong tendency to recommend the exclusion of the Convention, especially in commodity trade.[33] There are three main reasons given for this strategy. First, although the CISG is commonly known the degree of familiarity with its application and functioning in practice is still very low.[34] Lawyers still prefer their own domestic law and seem to stick to the saying "You can't teach an old dog new tricks". Second, and following from the first

[30] See R Knieper, *Celebrating Success by Accession to CISG*, 25 Journal of Law and Commerce (2005-06), 477.

[31] See P Schlechtriem, 'International Einheitliches Kaufrecht und neues Schuldrecht', in: B Dauner-Lieb, H Konzen and K Schmidt (eds), *Das neue Schuldrecht in der Praxis,* Cologne et al.: Carl Heymanns (2002), p. 71 (herinafter cited as "Neues Schuldrecht").

[32] Unfortounately the shift of the remedy system from cause approach to breach of contract approach has not been followed through but is now trapped between both.

[33] So far no reliable figures are available and the surveys that have been conducted to this date only provide limited insight and vary themselves. See for such surveys M Koehler, *Survey regarding the relevance of the United Nations Convention for the International Sale of Goods (CISG) in legal practice and the exclusion of its application (2006)*, available at http://www.cisg.law.pace.edu/cisg/biblio/koehler.html states that 70.8 % of participants from the U.S. and 72.2 % of participants from Germany regularly excluded the CISG while J Meyer, above n. 3, p. 371 arrives at 42 % for Germany. For Switzerland see the survey conducted by C Widmer and P Hachem, 'The CISG in Switzerland', in: F Ferrari (ed), *The CISG and its Incidence on National Contract Law,* Munich, Sellier (2008), p. 281, 285 where 62 % of the participants have stated to regularly exclude the CISG.

[34] Again the figures provided by surveys vary. Yet, the general rule among practitioners is that they work with the CISG where it is relevant: M Koehler, above n. 24, provides 29 % for the U.S. and 69 % for Germany. C Widmer and P Hachem, above n. 35, p. 285 provide 66 % for Switzerland. Both surveys also show that university eductation is the primary source of knowledge of the CISG.

reason, whenever the position of a party in the market allows for retaining its own domestic law in a contract, it prefers to do so. Third, the parties are not yet convinced of the advantages of the CISG compared to domestic sales laws. This argumentation, however, holds several shortages.

Although it is now common ground in western, industrialised countries that the parties are free to choose the law applicable to their contract it is certainly not a standard that holds true in all parts of the world. The fear of giving western trade corporations too many advantages still leads developing and transition countries to deny validity to choice of law clauses. The most prominent example is still Brazil where the validity of choice of law clauses is highly controversial.[35] Thus, for example many an American buyer acquiring goods from a Brazilian seller, being proud and confident of having contracted on the basis of the American UCC, may find itself in a very precarious condition when trying to sue the seller before Brazilian courts[36] with domestic Brazilian law being applied to the sales contract.[37] In the end this may very well lead to a situation where a party is confronted with a law that was hardly foreseeable and is not understandable or even truly accessible.

But even if a choice of law clause is recognised a party insisting on its own domestic law may still encounter difficulties when litigating before the courts in a foreign country. First of all, the law has to be proven in court. This implies not only the necessity to translate statutes as well as other legal texts such as court decisions and scholarly writings into the language of the court but also to provide expert opinions. In some countries the experts may be appointed by the court, in others each party will have to come forward with sometimes even several experts. Needless to say the procedures can be very expensive. This may even be harsher under a procedural system where each party bears its own costs regardless of the outcome of the proceedings as is especially the case under the so called "American Rule".[38] However, even

[35] See for comparison to U.S. conflict of laws rules D Stringer, *Choice of Law and Choice of Forum in Brazilian International Commercial Contracts,* 44 Columbia Journal of Transnational Law (2005-06), 959. 960 *et seq*.

[36] It should be noted that Brazilian courts do not consistently enforce forum selection clauses, see D Stringer, above n. 35, p. 960.

[37] D Stringer, above n. 35, p. 960 states that "the resulting legal uncertainty makes it difficult for U.S. lawyers accustomed to working within a party autonomy framework to manage risk while negotiating commercial contracts with Brazilian counterparties".

[38] A comparative overview of how the recovery of attorneys' fees is dealt with is given by JY Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations,* 21

if a party is willing to bear all these costs to prove a foreign law in court the question as to how this law is interpreted and applied is at best unpredictable and amounts to a lottery.

It can be argued that nowadays more and more international sales law disputes are not litigated before national state courts but rather are being resolved by international commercial arbitration. Still, the problem of proving the domestic law remains and translations are still necessary where this law is not accessible in English. Furthermore, it is still not clear how arbitrators often coming from different legal backgrounds will apply any domestic law.[39]

In many cases parties think to solve their problems by resorting to what they believe is a "neutral law" thereby often confusing political neutrality with suitability of the chosen law for international transactions.[40] In particular, this seems to be the case with Swiss law. If the parties choose such a third law they are even worse off. First, they have to investigate this foreign law. Second, the trouble and costs in proving it are even more burdensome. Last but not least, especially Swiss domestic sales law in core areas is unpredictable and not suitable to international contracts. This can be demonstrated by reference to only two examples. First, the Swiss Supreme Court distinguishes between *peius* and *aliud*;[41] the latter giving the buyer the right to demand performance during ten years after the conclusion of the contract notwithstanding whether it gave notice of non-performance or not. Where the line between *peius* and *aliud* will be drawn in a particular case is almost impossible to forecast.[42] The second example is compensation of consequential losses. Whether there is a claim for damages without fault depends on the number of links in the chain of causation.[43] Extremely short periods for giv-

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Michigan Journal of International Law (1999), 1, 4 *et seq*.; I Schwenzer, 'Rechtsverfolgungskosten als Schaden?', in: P Gauch, F Werro and P Pichonnaz (eds), *Mélanges en l'honneur de Pierre Tercier,* Zurich, Schulthess 2008, pp. 417, 418 *et seq*.

[39] Cf. C Fountoulakis, *The Parties' Choice of 'Neutral Law' in International Sales Contracts,* 7 European Journal of Law Reform (2006), 303, 307.

[40] On this issue see C Fountoulakis, above n. 39, pp. 306 *et seq*.

[41] A famous case is the so called Hubstaplerfall, see BGer, 5 December 2005, BGE 121 III 453.

[42] See C Fountoulakis, above n. 39, p. 308 *et seq*.

[43] See the recent decision of the Swiss Federal Supreme Court, BGer, 28 November 2006, BGE 133 III 257, para. 2.5.4.

ing notice of defects[44] as well as a limitation period of one year in case of a *peius*[45] furthermore militate against domestic Swiss law for the international context.[46]

All these shortcomings of domestic laws are prevented by applying the CISG. The text of the CISG is not only available in six authoritative languages but has been translated into numerous other languages. Court decisions, arbitral awards as well as scholarly writings are either written or at least translated into today's *lingua franca* of international trade, namely English. These are readily accessible not only via books or journals but also via websites.[47] The abundant number of legal materials available give reason to expect that judges and arbitrators are knowledgeable and able to apply the CISG in a predictable fashion.

To sum up, better accessibility of the CISG saves time and costs, and makes the outcome of cases more predictable. These are the main advantages of the CISG when compared to the application of domestic law.

[44] Article 201 OR speaks of "immediately". This requirement is interpreted very narrowly, cf. the still authoritative decision BGer, 27 June 1950, BGE 76 II 221 at 225 (four days sufficient as these included a Sunday). Even the minority view only advocates an average period of seven days, see H Zehnder, *Die Mängelrüge im Kauf-, Werkvertrags- und Mietrecht,* Schweizerische Juristenzeitung 96 (2000), 545, 548. The Swiss Federal Supreme Court itself has stated that the notice requirement within Swiss law is harsher than that of Germany and Austria which have similar rules in § 377 of their respective commercial codes, see BGer, 28 May 2002, CISG-online 676, para. 2.1.2. This is all the more true with regard to the CISG.

[45] Cf. Article 210 OR

[46] See C Fountoulakis, above n. 39, at 311. But see for the contrary view S Brachert A Dietzel, *Deutsche AGB-Rechtsprechung und Flucht ins Schweizer Recht,* Zeitschrift für das gesamte Schuldrecht 2005, 441 recommending the choice of domestic Swiss law as this provided appropriate solutions for B2B contracts especially in transnational contracts.

[47] Most prominently UNCITRAL has initiated the Case Law on UNCITRAL Texts (CLOUT) database, available at http://www.uncitral.org/uncitral/en/case_law.html, which contains court decisions and arbitral awards to increase international awareness of UNCITRAL texts and to facilitate their uniform interpretation and application. Further databases have since been established, see e.g. http://www.cisg.law.pace.edu/ run at Pace University, New York, U.S.A. containing numerous materials, scholarly writings, court decisions and arbitral awards; http://www.cisg-online.ch/ run by Prof. Ingeborg Schwenzer at the University of Basel, Switzerland containing selected articles and numerous court decisions and arbitral awards; http://www.unilex.info/ run by Prof. Michael Joachim Bonell containing materials, court decisions and arbitral awards on the CISG as well as the UNIDROIT Principles of International Commercial Contracts 2004.

VI. Criticism

Although the overall advantages of the CISG are now undisputable there remain several criticisms regarding the application of the CISG to international commercial transactions which still seem to nourish a strong adverse view on the Convention in certain legal systems. Having a closer look at these criticisms, however, reveals that they are in part unfounded as they stem from general misunderstandings and in all other cases appropriate solutions can be developed.

1. General Problems in the Application of Uniform Law

The first set of arguments relate to the general problems that one faces with uniform law – namely questions of uniform interpretation as well as the relationship between the application of uniform law and possibly concurrent domestic law remedies.

a) Uniform Interpretation

One of the first and main criticisms always has been the problem of uniform interpretation of the CISG. Particularly, the CISG is blamed for its imprecision and vague terms such as "reasonable" and general clauses such as the provision on fundamental breach, Article 25.[48] This criticism is especially advanced by lawyers with a Common Law background.[49] For centuries they have been accustomed to extremely detailed statutes. This is in part due to the delicate relationship between judiciary and legislators. In order to narrow

[48] See A Mullis, 'Avoidance for Breach under the Vienna Convention; A Critical Analysis of Some of the Early Cases', in: M Andreas and N Jarborg (eds), *Anglo-Swedish Studies in Law,* Stockholm, Iustus Forlag (1998), pp. 338, 339; K Takahashi, *Right to Terminate (Avoid) International Sales of Commodities,* Journal of Business Law 2003, 102, 124: "The CISG rules do not provide a high degree of legal certainty and predictability, inasmuch as they rely upon ambiguous concepts such as 'fundamental breach' and 'reasonable length'."

[49] See for example CP Gillette and RE Scott, *The Political Economy of International Sales Law,* 25 International Law and Economics (2005), 446, 473: "Uncertainty results not only from the many vague standards, but also from the use of ambiguous language that may have different meanings in different cultures." JE Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale f Goods as an Obstacle to a Uniform Law of International Sales,* 32 Cornell International Law Journal (1999), 273, 275: "the CISG's rules on interpretation are so obscure that the treaty's own guidelines for producing consistent interpretations fail to promote uniformity".

down any discretionary interpretation extensive catalogues of definitions[50] and meticulous instructions for construction and interpretation of contracts[51] are provided. It is conceded that in this respect the CISG indeed does not follow Common Law tradition but has instead been greatly inspired by the continental civil codes. However, it may draw on the continental experience with the interpretation of legal text.

Unlike the European Communities or OHADA, the CISG has no single supreme court guarding the uniform interpretation of uniform or harmonised law and this may be regarded as a severe deficit. However, there are other means to safeguard uniformity. It is now common ground that beyond traditional interpretation matters uniform law has to be interpreted autonomously and regard is to be had to its international character. In this respect the comparative legal method has proven most adequate and successful. Part of this method involves giving due consideration to foreign court decisions and arbitral awards; that are thus becoming more and more important on the international level. Whatever the situation in a domestic legal system may be, there can be no doubt that foreign decisions do not have a binding effect upon national courts.[52] Still, their persuasive authority today is rightly unanimously recognised.

Naturally, this method presupposes the accessibility and availability of foreign legal materials. Luckily today this goal has been widely achieved starting with the endeavours by UNCITRAL,[53] and other extensive international databases and English translation programs of foreign decisions and awards. The international development of the CISG is closely followed and brought together by a rich variety of commentaries stemming from the German legal tradition but published in English. Finally, the Advisory Council on the CISG is issuing opinions and giving guidelines for uniform interpretation of the Convention in crucial areas of possibly diverging approaches.

[50] See for example § 1-201 UCC.

[51] See for example Sec. 6 Interpretation Act 1978; "In any act, unless the contrary intention appears, (a) words importing the masculine gender include the feminine; (b) words including the feminine include the mansculine; (c) words in the singular include the plural and words in the plural include the singular."

[52] Today this can be viewed as common opinion, see instead of all P Schlechtriem, Commentary, Art. 7, para. 14.

[53] See the CLOUT case digests available at http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

Realistically, any uniform law has to rely on a certain imprecision. If a law is intended to be flexible enough to adapt to new factual and legal developments in decades to come it has to leave room for interpretation.[54] Unlike domestic law which may be changed and adapted by the legislator it would be illusionary to believe it possible to again bring together 71 nations to make adjustments to the wording of the CISG.[55]

The problems and possible solutions addressed here may be exemplified by the debate revolving around the interpretation of Articles 38, 39 CISG. These are the provisions on examination and notification in case of non-conforming goods. Most domestic legal systems do not recognise any such obligation of the buyer at all. Thus, it does not come as a great surprise that periods of more than a month were still held to be reasonable by courts from these countries. In contrast especially Germanic courts against their own historical background required notice to be given in a few days. Prompted by comparative scholarly writings nowadays the different former irreconcilable stances are finally converging. An average period of one month for giving notice is now gaining ground in most legal systems.[56]

[54] The criticism advanced by CP Gillette and RE Scott, above n. 49, pp. 480, 481 – "the incapacity to adapt the CISG to changing conditions suggests that it will necessarily evolve as an inferior alternative to the more adaptable sales law rules of individual states" – is therefore unfounded and hardly fits with their earlier criticism of the CISG using too vague a language.

[55] With regard to the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards UNCITRAL in 2006 started to make recommendations as to the interpretation of its provisions, cf. the recommendation available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf.

[56] See for Germany BGH, 8 March 1995, CISG-online 144; BGH, 3 November 1999, CISG-online 475; see also BGH, 30 June 2004, CISG-online 847 (more than 2 months considered unreasonable). For Switzerland see BGer, 13 November 2003, CISG-online 840 expressly upholding the judgment of the Court of Appeal Lucerne (Switzerland), 12 May 2003, CISG-online 846. See also Court of Appeal Lucerne (Switzerland), 8 January 1997, CISG-online 228. An exception has to be made with regard to Austria where the Federal Supreme Court still sticks to an overall period for examination of the goods and notification of defect of 14 days, see OGH, 15 October 1998, CISG-online 380; OGH, 27 August 1999, CISG-online 485; OGH, 14 January 2002, CISG-online 643. Outside Germanic legal systems courts have long before been more liberal in this respect, see *Shuttle Packaging Systems, L. L. C. v. Jacob Tsonakis, INA S. A. and INA Plastics Corporation,* U. S. Dist. Ct. (W. D. Mich.), 17 December 2001, CISG-online 773 = 2001 U. S. Dist. LEXIS 21 630: In case of complex machines, the buyer cannot be expected to notify the seller within a few

b) Concurrent remedies

Another urgent problem jeopardising uniformity may arise in the field of concurring domestic remedies. The CISG is exclusively concerned with the contractual relationship between the seller and the buyer. However, under most legal systems the mere existence of contractual remedies does not preclude a party from relying on other remedies, particularly those based in tort. The crucial question that then arises is whether a party under a CISG sales contract can assert concurring remedies pursuant to domestic law, notwithstanding that they may result in outcomes contrary to those reached under the CISG.[57]

This becomes particularly pertinent in relation to remedies for non-conformity of the goods. Can a buyer rely on domestic concepts such as culpa in contrahendo, mistake, negligent misrepresentation? Can it recover purely economic loss caused by a defective product or property damages especially in legal systems that recognise a tort claim for damage to the chattel itself? Can the buyer rely on these claims in cases where it is precluded from relying on the non-conformity under the CISG, if damages were not within the contemplation of the parties or if avoidance under the CISG were not possible because the breach does not amount to a fundamental one?

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weeks; *TeeVee Toons, Inc. (d/b/a TVT Records) & Steve Gottlieb, Inc. (d/b/a Biobox) v. Gerhard Schubert GmbH,* U.S. Dist. Ct. (S.D.N.Y.), 23 August 2006, CISG-online 1272 (approx. two months considered reasonable without further explanation). For an example from Chinese arbitration see CIETAC, 3 June 2003, CISG-online 1451 ("it is only nine months"). See also Court of Appeal Colmar (France), 24 October 2000, CISG-online 578 (adhesive foil: approx. six weeks), and comment by *C. Witz,* D. 2002, Somm. 393; Court of Appeal Versailles (France), 29 January 1998, CISG-online 337 (six to eleven months). In contrast, two months or longer were considered unreasonable, see Court of Appeal Paris (France), 6 November 2001, CISG-online 677 = D. 2002, 2795, with comment by *C. Witz*, Court of Appeal Aix-en-Provence (France), 1 July 2005, CISG-online 1096 (more than two months), Court of Appeal Gent (Belgium), 4 October 2004, CISG-online 985 (nine months); District Court Veurne (Belgium), 15 January 2003, CISG-online 1056 (nearly three months); District Court Rimini (Italy), 26 November 2002, CISG-online 737 (six months); Court of Appeal La Coruña (Spain), 21 June 2002, CISG-online 1049 (two and a half months); District Court Hasselt (Belgium), 6 March 2002, CISG-online 623 (two months); Maritime Commercial Court (Denmark), 31 January 2002, CISG-online 868 (seven months); District Appeal Court Arnhem (Netherlands), 27 April 1999, CISG-online 741 (two years).

[57] SA Kruisinga, (Non-)Conformity in the 1980 UN Convention on Contracts for the International Sale of Goods; A Uniform Concept?, Utrecht; Intersentia (2004).

The answers to these questions are highly controversial with Civil lawyers favouring a pro-convention approach[58] whereas Anglo-American scholars[59] seem to adopt a different stance. If one seeks to achieve the greatest level of uniformity it cannot be left to individual states to apply their domestic laws whether contractual or based on tort. Therefore, the need to promote uniformity as it is laid down in Article 7(1) CISG must lead to the conclusion that, as the late John Honnold put it, the CISG displaces any domestic rules if the facts that invoke such rules are the same that invoke the Convention.[60] In other words, wherever concurring domestic remedies are only concerned with the non-conformity of the goods – such as negligence in delivering non-conforming goods, negligent misrepresentation of the features of the goods, or mistake as to the features of the goods – such remedies must be pre-empted by the CISG. On the other hand, the CISG does not deal with fraud or safety requirements under product liability issues, thus leaving room for national concepts such as fraudulent misrepresentation or product liability in case of property damage to property other than the goods sold.

Similar problems arise in the borderland of substantive and procedural law. Procedural questions are not dealt with by the CISG. Thus, it may be questionable, whether such issues as burden and standard of proof which may often decide the outcome of a case are to be decided autonomously. Recently, in this context compensation for legal costs has been given great attention.

Nowadays the view that national conceptions of drawing the line between procedural and substantive law cannot be decisive is becoming more and more accepted. Relying upon such a distinction is outdated and unproductive.[61] Instead, the analysis should focus on the general principles of the

[58] See in particular R Herber, *Mangelfolgeschäden nach dem CISG und nationales Deliktsrecht – Zugleich Besprechung von Dirk Schneider, UN-Kaufrecht und Produktehaftpflicht,* Internationales Handelsrecht 2001, 187–190; R Herber, 'Zum Verhältnis Von UN-Kaufrechtsübereinkommen und deliktischer Haftung', in: I Schwenzer and G Hager (eds), *Festschrift für Peter Schlechtriem zum 70. Geburtstag,* Tübingen, Mohr (2003), pp. 207 et seq.

[59] See in particular J Lookofsky, *In Dubio pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Pre-emption under the 1980 Vienna Sales Convention (CISG),* 13 Duke Journal of Comparative and International Law (2003), 263, 285; Miami Valley Paper, LLC v. Lebbing Eng'g GmbH, U. S. Dist. Ct. (S. D. Ohio), 10. 10. 2006, CISG-online 1362; cf. also P Schlechtriem, Commentary, Art. 4, para. 23a.

[60] See JO Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention,* 3rd edn, The Hague, Kluwer Law International (1999), para. 65.

[61] See CISG-AC, Op. 6 (*Gotanda*), Comment 5.2 available at http://www.cisg-online.ch/cisg/docs/AC-Opinion%206.pdf.

Convention such as the principle of full compensation on the one hand and the equality between the parties on the other.[62] As a result the burden and standard of proof are to be derived from the Convention itself while the question of compensation for legal costs is to be decided by procedural law.[63]

Hence, also the swamp of concurrent domestic remedies can today be forded safely.

2. Incompleteness of the CISG

a) Issues of Validity

A further fundamental criticism relates to the incompleteness of the CISG. According to Article 4 the scope of the CISG encompasses the formation of contracts and the rights and obligations of the parties. The CISG is, however, not concerned with the validity of the contract or of any of its provisions. Some authors object in the first place that the meaning of the term validity was unclear[64] and, thus, leading to an inconsistent application of the Convention resulting in legal uncertainty. This argument may easily be discarded. The very term "validity" has to be determined autonomously.[65] This means that any question dealt with by the CISG or the general principles underlying the Convention can no longer be defined as being a validity issue. For example it is clear that a contract relating to non-existent goods is valid notwithstanding the position under the otherwise applicable domestic law.[66] This is because the CISG provides for the risk of loss in cases where at the time of the conclusion of the contract the goods had already been lost or

[62] In particular the latter point has been addressed by Justice R *Posner* in *Zapata Hermanos Sucesores, S. A. v. Hearthside Baking Company, Inc. d/b/a Maurice Lenell Cooky Company,* U. S. Ct. App. (7th Cir.), 19. 11. 2002, CISG-online 684 where he pointed out that a successful defendant could not recover legal costs under the CISG as there was no breach of contract on the side of the claimant. Insofar concurring I Schwenzer and P Hachem, 'The Scope of the CISG Provisions on Damages', in: D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives,* Oxford, Hart Publishing (2008), p. 104.

[63] See I Schwenzer and P Hachem, above n. 64, pp. 98, 99, 103; I Schwenzer, above n. 38, p. 425.

[64] See M Bridge, *A Law for International Sales,* Hong Kong Law Review 2007, 17, 23.

[65] Prevailing opinion see instead of many P Schlechtriem, Commentary, Art. 4, para. 7; F Ferrari, Kommentar, Art. 4, para. 15; Honnold, para. 65.

[66] Some domestic laws still provide for the invalidity of a sales contract in case of initial impossibility, cf. for example Art. 20 Swiss Law of Obligations. The same approach was taken by § 306 of the German Civil Code before its modernisation in 2002. Today § 311a(1) BGB expressly states that initial impossibility does not lead to the invalidity of the contract.

damaged (Article 68 sentence 3). The same holds true for the sale of goods that the seller does not own at the time of the conclusion of the contract.[67]

Likewise errors in expression that are only recognised as being relevant in very few legal systems[68] do not qualify as a matter of validity to be resolved by the applicable domestic law.[69] Rather, it follows from the general principles of the CISG[70] that the consequences of any error in expression have to be borne by the affected party.[71]

All of the cases mentioned above demonstrate the primary importance of preventing singular domestic preconceptions from undermining uniformity. Justifiable reliance on the existence of a contract which is granted by the vast majority of legal systems also needs to be protected in international trade.

One last special problem shall be addressed here; the validity of general conditions or standard terms. First, it cannot be doubted that the incorporation of standard terms is clearly regulated by the provisions of the CISG on the formation of contract.[72] This concerns issues such as accessibility, language, transparency, battle of forms as well as interpretation. However, in light of the plain wording of Article 4 sentence 2 lit. a) CISG the validity of clauses has to be determined by the otherwise applicable domestic law.

Still, some general yardsticks can be derived from the CISG itself. First, a party may not disclaim liability for its own intentional or grossly negligent conduct. This follows from several provisions within the CISG which preclude a party from relying on certain facts which it knew or could not have been unaware of. Consequently, it is more than appropriate to apply the same principle to liability for conduct. This position is reinforced by comparative law. Furthermore, a minimum adequate remedy must be retained as a principle that can be derived from the notion of full compensation under the CISG provisions on damages. This means for example that the buyer of totally worthless goods must at least be able to reclaim the purchase price. Therefore, clauses excluding all remedies will never be enforceable under the CISG.

[67] Despite Article 1599 French Code Civil. P Schlechtriem and C Witz, *Contrats du Vente International,* Paris; Dalloz (2008), para. 55.

[68] See the comparative analysis by EA Kramer and T Probst, 'Defects in the Contracting Process', in: AT vMehren (ed), *International Encyclopedia of Comparative Law, Vol. VII, Ch. 11,* Tübingen; Mohr (2001), paras 67 et seq., pp. 35 et seq.

[69] See M Schmidt-Kessel, Kommentar, Art. 8, para. 6.

[70] Cf. Articles 8, 16, 19, 27 CISG.

[71] See M Schmidt-Kessel, Kommentar, Art. 8, para. 6.

[72] Today this can be considered to be common opinion, see instead of all P Schlechtriem and UG Schroeter, Kommentar, Art. 14, para. 32 with numerous references.

b) Hardship

Several authors have complained about another perceived *lacuna* of the CISG – that is cases of a severe change of circumstances and the lack of an express provision on hardship, *rebus sic stantibus* or *Wegfall der Geschäftsgrundlage*.[73] Instead they praise other uniform projects[74] or domestic laws[75] for having introduced such provisions and advocate the applicability of the remedies laid down in these rules to CISG cases. The duty to renegotiate and the possibility of the court to adjust the contractual obligations to the changed circumstances is emphasised in particular.

As has been argued elsewhere[76] the CISG itself, however, is even better suited for a practical solution of the problem of the change of circumstances. Although Article 79 CISG taken at face value primarily deals with exemption in cases of *force majeure* a change of circumstances may also amount to an impediment in the sense of this provision. This is all the more true as today most subsequent events do not render performance impossible and thus do not constitute a veritable impediment in the sense of Art. 79 CISG, they just render performance more or less onerous for the obligor. Thus it seems preferable to deal with both situations under the same heading with the same prerequisites and the same consequences.

With regard to the remedies available upon hardship the CISG remedy mechanism is flexible enough to reach just and equitable results. On the one hand these guarantee legal certainty and on the other hand contribute to implementing good faith and fair dealing in international sales law. If the obligor who is faced with a change of circumstances suggests proceeding with the contract but on different terms, the obligee may not avoid the contract. A fundamental breach of contract (Article 25 CISG) would have to be denied if it were just and reasonable in the circumstances of the case to accept the different terms.[77] This approach allows for an indirect implementation of the duty to renegotiate and to adapt the contract to the changed circumstances.

[73] P Schlechtriem, Neues Schuldrecht, p. 76.
[74] Art. 6.2.3 PICC 2004; Art. 6:111 PECL 2000; Art. III. – 1:110 DCFR.
[75] Cf. § 313 of the German Civil Code.
[76] I Schwenzer, Kommentar, Art. 79, para. 54.
[77] See I Schwenzer, Kommentar, Art. 79, para. 54.

3. Content

A further fundamental criticism is advanced against the very principles and solutions of the Convention. Three points shall be specifically addressed; First, whereas some argue that the CISG is too seller friendly, others argue that the CISG is too buyer friendly. Second, it is still argued that the default system of the CISG conflicts with international practice and widely used trade terms. Third, the suitability of the CISG to govern commodity trade is still contested.

a) Neutrality Between the Parties

Concerning the first allegation it has been mostly representatives of developing countries that argued the CISG were too seller friendly. This allegation focuses mainly on the obligation of the buyer to examine the goods and give notice of any non-conformity.[78] At the Vienna Conference this position was also supported by the delegates from countries whose legal systems did not provide for any notice requirement. The well known compromise between both sides[79] can now be found in Article 44 CISG.[80] Furthermore, an interpretation of Articles 38, 39 CISG as it has been suggested above invalidates such criticism.

On the other hand, especially practitioners with a Germanic legal background fear the CISG being too buyer friendly. Specifically the Anglo-American concept of "strict liability" is stressed as well as – quite ironically – the attenuation of the notice requirement. However, the practical differences between the liability systems are in fact negligible.[81] Thus, the opposition only reveals a general and irrational fear of the hitherto unknown legal concepts and outside influences.

[78] Today the AUDCG in force in the member states of OHADA is even more restrictive than the CISG. While Article 228 requires notification of defect within reasonable time as does Article 39(1) CISG, Article 229 provides for a cut-off period of one year whereas Article 39(2) CISG contains a period of two years. UG Schroeter, above n. 23, p. 170 rightly describes this as "surprising".

[79] Speaking against any notice requirement were Kenia, Pakistan, China, Nigeria, Mexico, Singapore, Libya (O. R., pp. 321 *et seq.*, paras 42, 46, 47, 48, 50, 51, 59) as well as the United Kingdom (O. R., pp. 321 *et seq.*, para. 49). In favour of the requirement were The Netherlands, South Korea, Switzerland, Sweden, Bulgaria, Denmark, Austria, Australia, Japan, Federal Republic of Germany, Belgium, Spain (O. R., pp. 321 et seq., paras. 43, 44, 45, 52, 53, 55, 58, 60, 61, 62, 66, 68).

[80] Cf. I Schwenzer, Commentary, Art. 44, para. 2,

[81] See P Schlechtriem, above n. 26, para. 288.

All in all it seems fair to conclude that if one side is criticising the seller friendliness and the other side the buyer friendliness these arguments by definition neutralise one another, thus proving that the CISG achieves fair and reasonable results for both parties.

b) The CISG and the Necessities of Trade

In countries which have not yet ratified the CISG such as the UK, it is often suggested that the CISG does not suit the necessities of trade. This criticism focuses on two points; first on the relationship between the CISG provisions on risk of loss and the INCOTERMS and, second, on the specific needs of commodity trading.

These arguments may already be countered having regard to the drafting process of the Convention. The drafters did not only take into account contributions of academics, practitioners and governments but most notably also those of the International Chamber of Commerce (ICC).[82] Conversely, the ICC itself demonstrated its full support and appreciation of the CISG when adopting provisions of the CISG as ICC model terms such as the force majeure-clause 2003.

Concerning the CISG provisions regarding risk of loss, it is claimed "that they do not accommodate well understood delivery terms such as FOB and CIF and do not mesh well with Incoterms" thus failing "to capture the central ground of sales practice".[83] This criticism is based on a fundamental misunderstanding of the relationship between contract terms, including INCOTERMS, and the default system of the CISG. As the very name suggests, the default system only enters the scene if the parties have not made provision for a specific issue in their contract themselves. It is the advantage of a default system to give enough leeway to the parties to tailor their contract to their individual needs. To require the default system to mirror the vast majority of contracts would disqualify it at the same time from a much wider range of markets. As the CISG stands today it yields fair and just results for all kinds of sales contracts in very different markets. As *Jan*

[82] See P Schlechtriem, 25 Years, p. 169.

[83] M Bridge, 'The Transfer of Risk under the UN Sales Convention 1980 (CISG)', in: CB Andersen and UG Schroeter (eds), *Sharing International Commercial Law across National Boundaries Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday,* London, Wildy, Simmonds & Hill (2008), 77, 105

Ramberg has pointed out,[84] the CISG provisions on risk of loss as a default system are perfectly compatible with the INCOTERMS 2000 as contractual terms.

Finally, again, UK authors constantly allege that although the CISG may be suitable for the sale of manufactured goods it does not satisfy the needs of the commodity trade.[85] Apart from the already mentioned objection concerning risk of loss the rules on fundamental breach as well as cure are met with criticism.[86] However, as has been shown elsewhere the provisions of the CISG can easily be adapted to the peculiarities of the commodity trade. In those parts of the commodity market, where string transactions prevail and/or prices are subject to considerable fluctuations[87], special standards have to be applied in determining whether there is a fundamental breach. There, timely delivery by the handing over of clean documents – that can be resold in the normal course of business – is always of the essence of the contract.[88] If the parties do not stipulate this importance by respective clauses, this can be derived from the circumstances by an interpretation of the contract pursuant to Article 8(2), (3) CISG.[89] As a result, in practice, the seller's general possibility to remedy a defect in the documents that is normally provided by the CISG does not exist in the commodity trade. Thus, in this specific trade branch the solution under the CISG is quite similar to that under the perfect tender rule of the Common Law.[90]

[84] J Ramberg, *To What Extent do INCOTERMS 2000 Vary Articles 67(2), 68 and 69?,* 25 *Journal of Law and Commerce* (2005-06) 219–222.

[85] See M Bridge, above n. 66, p. 38; A Mullis, *Twenty-Five Years On – The United Kingdom, Damages and the Vienna Sales Convention,* 71 RabelsZ (2007), 35.

[86] On fundamental breach see A Mullis, above n. 48, pp. 344 *et seq*.; on cure see M Bridge, above n. 64, pp. 29 et seq.

[87] See CISG-AC, Op. 5 (Schwenzer), Comment 4.17 available at http://www.cisg-online.ch/cisg/docs/CISG-AC_Op_no_5.pdf

[88] See CISG-AC, above n. 87, Comment 4.17.

[89] See CISG-AC, above n. 87, Comment 4.17.

[90] But see M Bridge, *The International Sale of Goods,* 2nd edn, Oxford, Oxford University Press (2007), para. 12.26 who believes that it is unlikely that such results will be achieved through Articles 6, 9 CISG.

VII. Conclusion

It has been shown that all in all the story of the CISG has been a story of worldwide success. Criticism that has been put forward can largely be discarded as unfounded or pre-empted by a correct interpretation of the Convention.

Most importantly, the success of the CISG shows that pursuing the unification of laws is the right way. The harmonising effect the Convention had and has on domestic legal systems and its influence on other uniform instruments and projects prove the superiority of the CISG and disprove the argument that the competition of domestic legal systems[91] may offer a viable perspective for the future of commercial law.

Uniform law not only helps resolving disputes, common language and common understanding of key concepts also facilitate negotiating and drafting sales contracts.[92] This, in turn, considerably helps in limiting transaction costs.[93]

At the end of the day all criticism boils down to the aforementioned saying of the old dog unwilling to learn new tricks. However, a new generation of lawyers is already waiting at the doorstep to take over business; a generation trained in the CISG knowing the advantages of this set of rules and in general a generation bursting with curiosity about the world elsewhere.

[91] This argument is in particular advanced by CP Gillette and RE Scott, above n. 49, pp. 49 *et seq*.

[92] Schlechtriem, 25 Years CISG, 167, 187.

[93] Schlechtriem, 25 Years CISG, 167, 187.